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No. 512

# In the Supreme Court of the United States

OCTOBER TERM, 1970

HY-VEE FOOD STORES, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3–A5) is not yet officially reported. The Board's decision and order (A3–33)[1] are reported at 176 NLRB No. 5, and its supplemental decision and order (A. 34–38) are reported at 178 NLRB No. 101.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A5–A6) was entered on June 29, 1970. The petition for a writ of certiorari was filed on August 10, 1970.

[1] "A." refers to the Appendix to the briefs in the court below.



403-732—70

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner, by various means, restrained and coerced its employees and unlawfully refused to bargain with their union representative.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *
>
> SEC. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

## STATEMENT

On July 30, 1968, four of petitioner's six meat-department employees at its store in Kirksville, Missouri, met with Ted Wolff, a business representative

of the Union [2] (A. 35, 33, 4; 42, 66–67, 77–78). Wolff explained to them that union recognition could be obtained either by winning a Board-conducted election or by presenting authorization cards signed by a majority of the employees. He recommended the latter course (A. 35, 33, 4; 43, 63, 78), and gave the four employees cards, which they were told to read carefully; he stated that he intended to use the cards as his authority to ask petitioner for recognition (A. 33, 3; 43–44, 78). All four signed a card that day (A. 35, 33, 4–5; 44–45, 78–79, 176–179). Another meat-department employee, Donald Harker, signed a fifth card and handed it to Wolff on August 6, 1968 (A. 5; 42–43, 46, 49–50, 79, 96–97, 181).

Wolff, accompanied by Union Steward Lowell Robinson, met with Store Manager Adam Marshall on August 6, and told him that he represented a majority of the meat-department employees at Kirksville, presenting copies of four signed cards and Harker's original card. He demanded recognition (A. 35, 33, 6; 51–54, 70–72, 101, 125, 145, 144, 182) adding that Marshall could resolve any doubts he might have about the cards or the employees' true desires by speaking to the employees who were available in the store. Marshall replied that that "wasn't necessary" (A. 6; 54, 73), but asked Wolff what had prompted the employees to seek union representation (A. 6; 55, 72). Wolff mentioned concern over job security and several other items (A. 6; 55–56, 146). When August 12

[2] Amalgamated Meatcutters & Butcher Workmen of North America, AFL–CIO, Local Union 576.

was proposed for the first bargaining meeting, Marshall replied that he would have to check with other officials of petitioner (A. 6-7; 56, 73, 145).

That same afternoon, Marshall summoned to his office three of the employees involved, and told them that he "wanted to know what [their] problems were" since he "wasn't aware of these complaints" which had been detailed by Wolff (A. 35, 33, 8; 98, 101, 125, 145-146). The employees explained their concern over job security; Meat Supervisor Charles Smock, who was also present, then stated that he "didn't like the idea of the union at all and he didn't like to go through a third party" (A. 35, 8; 102, 105, 126, 146). Smock inquired whether the employees would be satisfied if petitioner "could come up with something similar, a contract proposal or something, that we could discuss without having to go through the third party" (A. 35, 8; 102, 125). When the employees said no, Marshall replied, "If you join the union or go union, all I will say is good morning when you come to work, all the rest will have to be done through a third party, the union" (A. 35, 8; 126). Later that afternoon, Marshall told two of the meat-department employees that "if they wanted a promotion or transfer to another store then it wouldn't be able to happen because there wasn't any union in any of the other departments" (A. 35, 9; 99, 102).

Wilson Clemmons, petitioner's Vice President of Retail Organizations at all of its 63 stores, came to Kirksville on August 8 (A. 35, 9; 110, 126, 132). He called the five employees who signed cards into a backroom

and questioned each in turn about his reasons for seeking union representation (A. 9–10; 80, 103, 110, 140). As Clemmons dismissed two of the employees, he asked each to "search [his] soul and think this thing out thoroughly" (A. 10; 82, 103).

When employee Charles Baker was asked what his "gripe" was, he replied "that Adam [Marshall] promised me a raise previous to my coming to the meat department, I had not got it yet" (A. 10; 110–111). Clemmons admitted that this was a mistake and asked, "Have you given any thought to an election?" Baker replied, "No, I have signed the card * * *" (*ibid.*).

The same day, employee Donald Harker was questioned by both Marshall and Clemmons (A. 35, 11; 98). Marshall asked if Harker planned to stay in the meat department, and Harker replied, "Yes" (A. 35, 11; 98–99). Marshall then asked if Harker knew that "the Union won't help [him] in anything but the meat department?" (*ibid.*). Clemmons also asked Harker, "If [he] thought [he] could get along with [the Union]" (A. 11; 99). Marshall closed the meeting by saying, "I think we have been close enough friends that I figured at least you would come to me when you needed help" (A. 11; 88, 99). The next morning, August 9, Marshall again elicited Harker's reasons for joining the Union and then commented:

> Well, I want to give you some advice * * *. This might have a bearing on your future with Hy-Vee * * *. This might have some bearing on your promotions and advancement * * *. [A. 11–12; 82.]

Vice President Clemmons returned to Kirksville on August 12 or 13, and spoke individually with three of the employees (A. 35, 12; 104, 111, 127). His conversation with Charles Baker paralleled their conversation of the previous week (A. 12; 111). After determining from employee Marjorie Smith that she had not "changed [her] mind about the Union," Clemmons warned her that "this won't do you any good. You will not get anything out of it" (A. 12–13; 127). Clemmons went on to stress the difficulties of reaching a collective bargaining agreement and the possibility of a strike (A. 13; 127–128, 131). To employee Garry Stanley, Clemmons said that the Union "would finally get" a contract with the petitioner, but that "it may take six months or a year or so" (A. 13; 104).

On August 13, Joe and Donald Harker told Store Manager Marshall that they both had signed and mailed a document to the Union withdrawing their July 30 authorizations (A. 36, 13; 61–62, 67, 187, 190, 191). On August 14, petitioner wrote the Union that it would not recognize the Union as bargaining representative of its meat-department employees because the Union did not represent a majority of the employees (A. 14; 61, 187). On August 15, Charles Baker also signed a document revoking his authorization (A. 35, 13; 62, 67, 117, 155, 159, 189).

The unfair labor practice complaint in this case issued on October 15, 1968 (A. 36, 14; 172). A few days later, both Joe Harker and Charles Baker received wage increases of 55 and 60 cents per hour, respec-

tively (A. 36, 14; 84–85, 120). Previously, both men had received pay raises in increments of 15 to 25 cents per hour (A. 14; 85, 114). About November 5, two weeks before the Board hearing in this case, Marshall told Donald Harker, "I would like to have one of you three boys, either you, Chuck, or Joe, to stand up in the trial and ask for an election" (A. 36, 16, 22; 100).

On the basis of this evidence, the Board found that petitioner, in violation of Section 8(a)(1) of the Act, threatened its employees with reprisals because of their union affiliation, coercively questioned them concerning such affiliation, granted wage increases to induce the employees to abandon the Union, and attempted to interfere with the Board's processing of the unfair labor practice charge (A. 35–36, 27–28). The Board further found that the Union had authorization cards from a majority of the employees in an appropriate unit when it sought recognition, that petitioner's unfair labor practices had dissipated the Union's majority status and precluded the holding of a fair election, and that petitioner had thus also violated Section 8(a)(5) of the Act (A. 36–37, 24–26). The Board thus ordered petitioner to cease and desist from these unfair labor practices, to bargain with the Union upon request, and to post appropriate notices (A. 37–38, 29–32).

In a *per curiam* opinion, the court of appeals, having "carefully canvassed the whole record," was "left

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[3]The Board found that a bargaining order was warranted under both of the standards set forth in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 614–616 (A. 36–37).

with the firm conviction that the Board's findings are supported by substantial evidence" (Pet. App. A–4). Accordingly, it enforced the Board's order in full (Pet. App. A–5).

## ARGUMENT

The petition rests upon a version of the facts which has now been rejected both by the Board and the court of appeals. It presents only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. The facts summarized in the Statement demonstrate that the court below properly concluded that the Board's findings and conclusions are adequately supported by the record.

## CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

## PETITIONER'S REPLY

**To Brief of the National Labor Relations Board**

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vs.

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Respondent.

## PETITIONER'S REPLY

**To Brief of the National Labor Relations Board**

Petitioner feels it is necessary to reply to the Brief of the National Labor Relations Board. We submit the following:

### JURISDICTION

The Brief of the National Labor Relations Board does not fully state the basis for jurisdiction of this Court under the heading "Jurisdiction". This Court has jurisdiction under the provisions of Section 10 (e) of the National Labor Relations Act, 29 U. S. C., Section 160 (e) (f), and Supreme Court Rule No. 23.

Further, the Brief for the Board omits the basic statute on jurisdiction involved herein, which states the duty of the Courts on review of Board Decisions. This Court in Universal Camera Corp. v. NLRB, 340 U. S. 474; 71 S. Ct. 456; 464; 95 L. Ed. 456, stated that under the provisions of Section 10 (e) of the National Labor Relations Act (29 U. S. C., Sec. 160 (e)), the Courts must review the whole record, and must consider the conflicting evidence, and pass upon its weight, and determine whether the findings of fact by the Board are "supported by substantial evidence on the record, considered as a whole." This states jurisdiction, and a mandate to the Courts.

We have presented this legal requirement beginning on page 41 of our Petition. This statute is ignored in the Brief for the Board.

## STATUTES INVOLVED

The Brief of the National Labor Relations Board on page 2 undertakes to quote the "Statutes Involved." However, very important provisions of the applicable statutes are omitted.

A part of Section 7 of the National Labor Relations Act is set out which states only the right of employees to engage in union activities. The important part thereof, and upon which Petitioner relies, is omitted. There should be added to the quotation from Section 7 the following:

> "and shall also have the right to refrain from any or all of such activities."

All of said Section 7 is set out in our Petition at the bottom of page 39, and is referred to on pages 48 and 58 of said Petition.

We especially emphasize that Section 7 states that employees shall have the right to belong to the union, to en-

gage in union activities, and to have a union bargain for them. But, it is equally stated that employees shall also have the right to refrain from any or all of such activities. Here three employees specifically exercised that right and cancelled the authorization cards signed by them two weeks before.

Also, there is involved Section 8 (c) of the National Labor Relations Act, the freedom of speech provision. We have quoted Section 8 (c) in full on page 14 of our Petition. Because of its importance, and for convenience we requote it here:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8 (c) of the Act is highly applicable and important because the Complaint herein by the Board is relative to the expressing of views, argument, and opinions by Mr. Marshall, the store manager, and by Mr. Clemons, the company vice-president. This statute is important because it specifically provides that such statements are permitted if they "contain no threat of reprisal or force or promise of benefit."

## REPLY STATEMENT

Note that the Complaint herein by the Board is as to the expressing of views, arguments, and opinions by Mr. Marshall, the store manager, and by Mr. Clemons, the company vice-president. When these charges are read, it must be kept in mind that "such expressions" are permitted if they "contain no threat of reprisal or force or

promise of benefit." Counsel for the Board in their Brief herein did not review and discuss the record as a whole. They state misquotes from the erroneous decisions of the Trial Examiner and of the Board. However, these statements do not show the context in which they appear, nor the context of the record as a whole. The Board's Brief follows the same vice as the statements by the Trial Examiner and by the Board. They did not follow the admonition of the law to consider the record as a whole, and the conflicting evidence.

We respectfully request this Court in considering our Petition, to carefully read the statements of the testimony of the witnesses as set out therein. Our statement thereof shows the context thereof, and affirmative evidence that both Mr. Marshall and Mr. Clemons actually told each of them they had a right to have the union, but to think it over carefully. We have set out that testimony and respectfully request this Court to note it.

In considering the inadequacy of the statements of facts in the Board's Brief, it must be kept in mind that Mr. Wolff, the union business representative, told Mr. Marshall, the store manager, that the principal reason for the employees wanting the union as their representative, was for job protection, that they had a feeling that some of them would be discharged because there had been some reorganizing and discharges in another department of the store. Note that Mr. Wolff invited Mr. Marshall to talk with the employees as to their reasons if he had any question (A. 54, 55, 64). Mr. Marshall and Mr. Clemons did only what Mr. Wolff suggested. The important thing that they said to the employees, was that there was no danger of any of them being discharged as long as they continued to do good work. They explained that the reorganizing in the grocery department was an entirely different thing and did not apply to the

meat department. That is the gist of the explanation and talk to the employees.

It will be noted further, and there is no question about it on the record, that Mr. Wolff presented to Mr. Marshall a copy of the Green Hills Store Contract, and had written on it "contract proposal for meat department employees of Hy-Vee Store, Kirksville Missouri" (A. 47, 55). Mr. Marshall read that contract in the presence of Mr. Wolff and asked questions about it. In visiting with the employees Mr. Marshall called attention to certain provisions of that proposed contract which if it became the Hy-Vee contract would limit promotions for the meat department employees, and that since there was no unionized meat department in any other Hy-Vee store, they would be limited to their unit there of six employees. This is an expression of an opinion and view as to what the union was proposing for them, and is clearly permitted under the provisions of Section 8(c) of the Act. Under the circumstances, because of the mistaken assumption by five of the employees that their jobs were in jeopardy, it was a favor to them to call the exact and true situation to their attention, and to point out their mistake in assuming that their jobs were in jeopardy. That is all that occcurred in these conversations with the employees. True, the Trial Examiner and the Board in their decisions took parts of sentences and isolated phrases, and gave them a meaning **which they did not bare.** The context in which they appear and the record as a whole show clearly that there was no threat of reprisal or force, or promise of benefits at any time any where.

The Green Hills Contract, Exhibit 7 (A. 180) provides that no one under the age of 18 years could be employed in the meat department. Note that Donald Harker was 17 years old at that time. Mr. Marshall called that provision of the contract to Donald's attention and merely informed him that if that were the contract at Hy-Vee